

RESOURCING U.S. MILITARY OPERATIONS
28 DECEMBER 2006

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FUNDING U.S. MILITARY OPERATIONS

I. INTRODUCTION.

II. CONSTITUTIONAL PREDICATE.

A. President's Power.

1. "The President shall be the Commander in Chief of the Army and Navy of the United States " U.S. Const. Art. II, § 2, cl. 1.
2. "He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls " U.S. Const. Art. II, § 2, cl. 2.
3. "[H]e shall receive Ambassadors and other public Ministers " U.S. Const. Art. II, § 3.

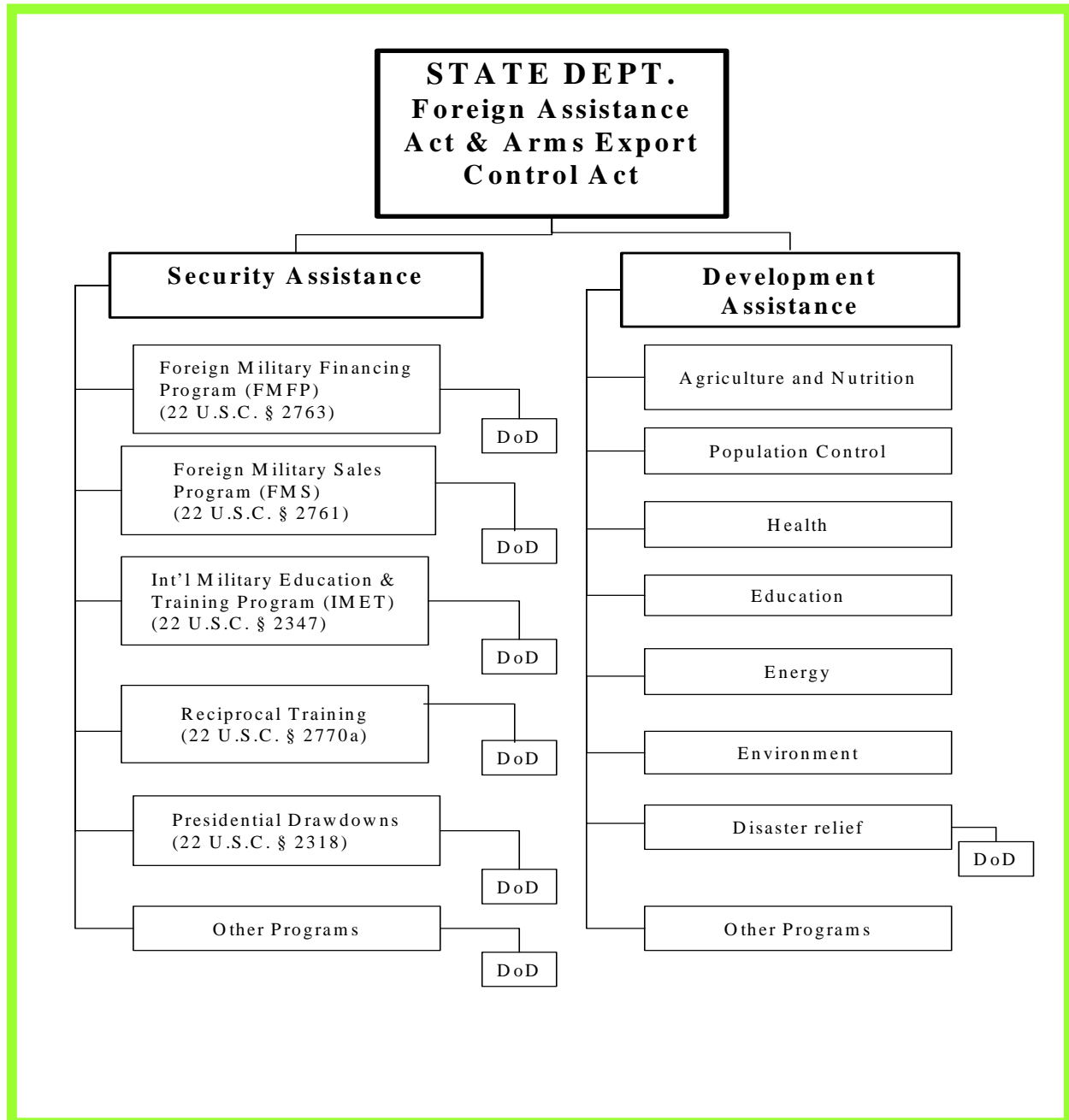
B. Congress' Power.

1. "No money shall be drawn from the Treasury, but in Consequence of Appropriations made by law" U.S. Const. Art. I, § 9, cl. 7.
2. "The Congress shall have the Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States" U.S. Const. Art. IV, § 3, cl 2.

"An effective foreign policy requires more than ideas and pronouncements. It requires institutions, agencies, people and money, and Congress controls them all. Through the authorization and appropriation process, Congress sets the terms of commerce; it provides military forces and intelligence capabilities; and it establishes the conditions for development assistance, security support programs and U.S. participation in

international organizations. . . . Hardly any important executive branch decision is taken without consideration of the reaction in Congress.”

Trimble, The President's Foreign Affairs Power, 83 AM. J. INT’L. LAW 750 (1989)



- C. Legislative Controls: Of the three general limitations - Purpose, Time, and Amount; the Purpose Statute is the fiscal control that has the primary focus for the fiscal law practitioner in a military operation setting.

1. 31 U.S.C. § 1301(a) provides:

Appropriations shall be applied only to the objects for which the appropriations were made except as otherwise provided by law.

2. Three-Part Test for a Proper Purpose. In 1984, the Comptroller General specifically addressed numerous funding issues within the Ahuas Tara military exercises conducted in Honduras. Accordingly, the Comptroller General reiterated the three factors that determine whether to expend a specific appropriated fund. In this case, the Comptroller General was reviewing the use of Army O&M funds or whether other appropriated fund sources should have been used, such as funding through the Department of State. The three factors are the following:

- a. The expenditure must be reasonably related to the purposes for which the appropriation was made. (In other words more commonly cited, the expenditure of an appropriation must be for a particular statutory purpose, or **necessary and incident** to the proper execution of the general purpose of the appropriation.)
- b. The expenditure must not be prohibited by law.
- c. The expenditure must not fall specifically within the scope of some other category of appropriations. This last requirement applies even if the more appropriate funding source is exhausted and therefore unavailable.

See, The Honorable Bill Alexander, B-213137, 63 Comp. Gen. 422 (1984).

3. Operations & Maintenance (O&M) Recurring Issues. O&M purpose: "For expenses, not otherwise provided for, necessary for the operation and maintenance of the [A, AF or N, D] as authorized by law...

- a. "For expenses" – May not use for capital investments – see FMR Vol 2A, paragraph 010201 on the expense – investment threshold and Section 8036 of the FY06 DOD Appropriations Act stating O&M may be used "to purchase items which have an investment unit item cost of not more than \$250,000.";
- b. "not otherwise provided for" – O&M not for Weapons, Ammo or Vehicles - Note that Congress appropriates funds separately for each MilDep for Weapons, Ammunition, and e.g. Procurement, Army Other: "For construction, procurement, production, and modification of vehicles, including tactical, support, and non-tracked combat vehicles; the purchase of passenger motor vehicles for replacement only..."
- c. "necessary for the operation" – Construction – a special problem area. Maintenance and repair is not construction; conversion is construction. 10 USC § 2805(c)(1) specifically authorizes the use of O&M for a military construction project costing not more than \$750K (or \$1.5M for a project intended solely to correct a life, health, safety deficiency). Other minor milcon, requires minor milcon money.
 - (1) MILCON during Contingency Operations – must seek SecDef waiver and approval to use O&M in excess of MilCon thresholds per section 2808(a) of the Military Construction, division B of the National Defense Authorization Act of FY 2004, as amended by section 2810, of the same Act for FY 2005, section 2809 of the same for FY 2006 and section 2802 for the FY 2007 National Defense Authorization Act.
 - (2) LOGCAP – O&M is no longer the exclusive source of funding for LOGCAP. Continue to fund services with O&M, keeping in mind that all items and construction activities of the contractor become the property of the Govt and must be funded by the proper source of funds. DOD, OGC Opinion dated 7 March 2006, **attached as Enclosure B.**

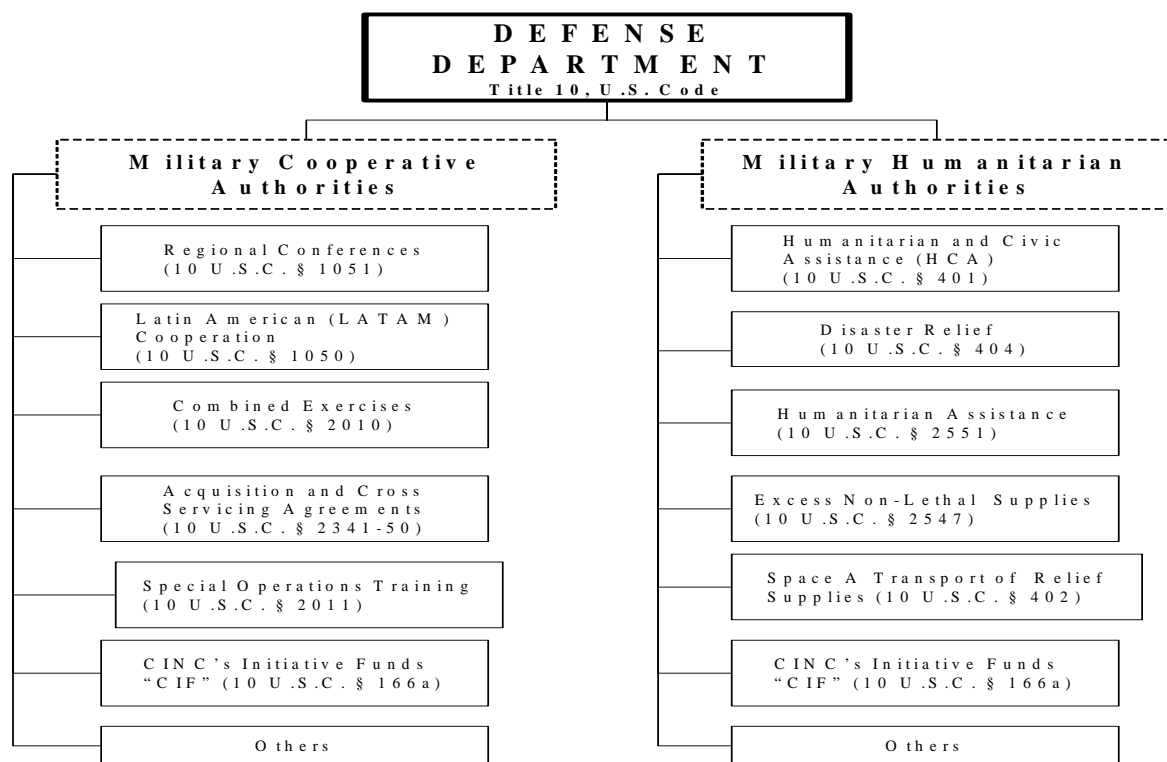
III. THE NEED FOR EXPRESS LEGAL AUTHORITY.

A. General.

“The established rule is that the expenditure of public funds is proper only when authorized by Congress, not that public funds may be expended unless prohibited by Congress.”

United States v. MacCollom, 426 U.S. 317 (1976).

B. “Article II Operations”: Inherent Authority? *See, e.g.*, R. Rosen, Funding Non-Traditional Military Operations: The Alluring Myth of a Presidential Power of the Purse, 155 MIL. L. REV. 1 (1998) and W. Banks & P. Raven-Hansen, NATIONAL SECURITY LAW & THE POWER OF THE PURSE 166 (1994).



IV. ASSISTANCE TO ALLIES: SUPPORTING COALITION OPERATIONS.

- A. Supporting Multilateral Peace Operations: Policy - Presidential Decision Directive (PDD) 25 (May 3, 1994).
 - 1. General. PDD 25 addresses the following areas:
 - a. Choosing which operations to support.
 - b. Defining U.S. policy regarding command and control. *See also* H.R. 1530, § 1301, 104th Cong., 1st Sess. (1995); 31 Pres. Doc. 2234 (Dec. 28, 1995) (Presidential veto of Defense Authorization Bill prevented additional Congressional restrictions on C2 policy in UN operations.)
 - c. Reducing U.S. costs for UN peace operations.
 - d. Reforming/improving UN management of peace operations.
 - e. Improving U.S. management and funding of peace operations.
 - f. Creating better cooperation between the Executive & Legislative branches.
 - 2. Funding Provisions.
 - a. *Reimbursement.* U.S. will generally seek either direct reimbursement for provision of goods and services or credit against UN assessment. In rare circumstances, U.S. may contribute goods, services, and funds on a voluntary basis. *But see*, paragraph B.1.b., *infra*.
 - b. *Oversight & Management.*

- (1) Department of State has responsibility for oversight and management of Chapter VI peace operations in which U.S. combat units are not participating.
 - (2) Department of Defense has responsibility for oversight and management of Chapter VI operations in which U.S. forces are participating and for all Chapter VII operations.
- c. *UN Assessments.* No DoD funds may be expended, directly or indirectly, to make a financial contribution to the UN for the cost of a UN peacekeeping activity or for payment of U.S. arrearages to the UN. 10 U.S.C. § 405.

B. Authority: UN Participation Act (UNPA) § 7, 22 U.S.C. § 287d-1.

1. *Scope.* Upon UN's request, President may authorize the following support specifically directed to the peaceful settlement of disputes and not involving employment of the armed forces under Chapter VII of the UN Charter --
 - a. Details of Personnel. Up to 1,000 military personnel as observers, guards, or any non-combatant capacity.
 - b. Supplies, Services, & Equipment. Furnishing of facilities, services, or other assistance, and the loan of the U.S.'s fair share of supplies and equipment.
2. *Reimbursement.* Section 723 of the FY 00-01 Foreign Relations Authorization Act (as enacted in Pub. L. No. 106-113) amended the UNPA to add a new Section 10. Section 10 requires the United States to obtain reimbursement from the UN for DoD assistance that is provided to or for an assessed UN peacekeeping operation, or to facilitate or assist the participation of another country in such an operation. The statute provides for several exemptions and grounds for waiver. **This requirement to receive reimbursement is not limited to assistance provided under the UNPA, but applies to any authority under which assistance may be provided to an assessed peacekeeping operation.**

- a. *Delegation of Authority.* The President has delegated authority to direct support to the Secretary of State (SecState). Executive Order 10206, ¶ 1, 16 Fed. Reg. 529 (1951). He has delegated the authority to waive (in national interest) reimbursement to SecState, in consultation with the Secretary of Defense (SecDef). *Id.* ¶ 2.

C. Drawdowns.

1. *Foreign Assistance Act (FAA) § 506(a)(1), 22 U.S.C. § 2318(a)(1)* - Authorizes the President to direct the drawdown of defense articles and services having an aggregate value of up to \$100,000,000 in any fiscal year for unforeseen emergencies requiring immediate military assistance to a foreign country or international organization. *See* Defense and Security Assistance Improvements Act, Pub. L. 104-164 (1996) (increase from \$75M to \$100M).
2. *FAA § 506(a)(2), 22 U.S.C. § 2318(a)(2)* - Authorizes the President to direct the drawdown of articles and services having an aggregate value of up to \$200,000,000 from any agency of the U.S. in any fiscal year for (among other things) counterdrug activities, disaster relief, non-proliferation, anti-terrorism, and migrant and refugee assistance, antiterrorism, and non-proliferation assistance. (The Security Assistance Act of 2000 increased the amount from \$150M to \$200M and added antiterrorism and non-proliferation to the permissible uses of this authority.) Of that amount, not more than \$75M may come from DoD resources; not more than \$75M may be provided for counternarcotics; and not more than \$15M to Vietnam, Cambodia and Laos for POW accounting. Drawdowns supporting counternarcotics and refugee or migration assistance require 15 days notice to Congress. *See* Defense and Security Assistance Improvements Act, Pub. L. 104-164 (1996); FY 2001 Security Assistance Act, Pub. L. 106-280, 114 Stat. 850 (2000).
3. *FAA § 552(c)(2), 22 U.S.C. § 2348a(c)(2)* - Authorizes the President to direct the drawdown of up to \$25,000,000 in any fiscal year of commodities and services from *any* federal agency for unforeseen emergencies related to peacekeeping operations and other programs in the interest of national security.

4. *Iraq Liberation Act of 1998, P.L. No. 105-338, 112 Stat. 3178 (Oct. 31, 1998)* – Authorizes the President to direct the drawdown of defense articles from the stocks of DoD, defense services of DoD, and military education and training for Iraqi democratic opposition organizations. This assistance may not exceed \$97 million and requires 15 days notice to Congress. President Bush subsequently directed \$92 million in drawdown assistance in 2002. *See, Presidential Determination No. 03-06, 67 Fed. Reg. 78,123 (Dec. 23, 2002).* Unique to drawdowns, Congress subsequently appropriated \$63.5M reimbursement for IFSA drawdown support. *See, Sec. 1309 of the FY03 Emergency Wartime Supplemental Appropriation.*
5. *Afghanistan Freedom Support Act of 2002, P.L. No. 107-327, 116 Stat. 2797 (Dec. 4, 2002, codified at 22 USC §7532* – Authorizes the President to direct the drawdown of up to \$300 million of defense articles, defense services, and military education and training for the Government of Afghanistan, eligible foreign countries, and eligible international organizations. This authority is carried out under section 506 (22 USC §2318(a)(1)) of the Foreign Assistance Act. The assistance may also be provided by contract. *Section 9008 of the FY05 Defense Appropriations Act Pub. L. No. 108-287 (2004)* increased this Afghan drawdown authority to \$550 million. Oddly enough lightning has struck the same point twice, Congress provided \$165M reimbursement for the AFSA Drawdown. *See, Sec. 1307 of the FY03 Emergency Wartime Supplemental Appropriation.*

D. 10 USC §127c – Logistical Support to Allied Forces – Global Lift & Sustain

1. By Section 1201 of FY07 NDAA, Congress provided drawdown-like authority to use up to \$100M per fiscal year to provide logistic support, supplies, and services to partner nation forces. This new authority has not yet been delegated below SecDef approval; other limitations include:
 - a. SecState concurrence required
 - b. May only be used for a combined operation with US forces.

E. Special Logistical Support Funding Authority for Cooperating Nations in OIF and OEF.

1. **Coalition Support Fund (CSF) - Emergency Supplemental Appropriations Act for Defense and for Reconstruction of Iraq and Afghanistan, 2004, Pub. L. No. 108-106 (2003), § 1310** (hereinafter FY04 ESAA) Authorized \$1,150,000,000 of Defense-Wide O&M to remain available until expended (\$4.3 billion total Defense-Wide O&M) to **reimburse** Pakistan, Jordan, and other key cooperating nations for logistical and military support provided to U.S. military operations in connection with military action in Iraq and the global war on terrorism. This authority requires the Secretary of State concurrence, 15 day prior notification to Congress, and quarterly reports to Congress. *Public Law No: 109-234, Making emergency supplemental appropriations for the fiscal year ending September 30, 2006*, added to that amount by \$740M, and the base FY07 Defense Appropriations Act added another \$900M.
2. **Lift & Sustain - Section 1106 of the FY04 ESAA-** authorized Defense Wide O&M Funded Support to Coalition Partners. Defense O&M may be used to provide supplies, services, transportation, including airlift and sealift, and other logistical support to coalition forces supporting military and stability ops in Iraq. **Section 9008 of the FY 07 and Section 9009 of the FY 06 & FY05 Defense Appropriations Act Pub. L. No. 108-287 (2004)** continued this “Lift & Sustain Authority”, and also include authorization to support coalition force operations in Afghanistan.

F. Special Train and Equip (T&E) Authorities for Iraqi and Afghan Security Forces.

1. *Section 1107 of the FY04 ESAA* authorized that \$150 million of Defense-Wide O&M may be used to provide assistance to the New Iraqi Army and the Afghan National Army to enhance their capability to combat terrorism and to support U.S. military operations in Iraq and Afghanistan. This authority requires Secretary of State concurrence and 15 days prior notification to Congress. The assistance may include: equipment, supplies, services, training and funding that would normally be security assistance funded through the Department of State.
2. *Section 9006 of the of the FY06 and the FY05 Defense Appropriations Act Pub. L. No. 108-287 (2004)* continued this authority for FY 05 with increased authority to use \$500 million of Defense-Wide O&M.

3. *Section 1202 of the FY05 National Defense Authorization Act, Pub. L. No. 108-375 (2004)* expanded the definition of security forces that could receive this support.
4. *Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief Act, 2005, Pub. L. 109-13 (May 11, 2005)* created the Afghanistan Security Forces Fund (ASFF) (\$1.285 billion) and the Iraq Security Forces Fund (ISFF) (\$5.7 billion), to remain available until Sept. 30, 2006, "that such funds shall be available to the Secretary of Defense, notwithstanding any other provision of law, for the purpose of allowing the Commander [Combined Forces Command-Afghanistan for ASFF and Multi-national Security Transition Command-Iraq for ISFF] or the Secretary's designee to provide assistance, with the concurrence of the Secretary of State, to the security forces of [Afghanistan for ASFF, Iraq for ISFF] including the provision of equipment, supplies, services, training, facility and infrastructure repair, renovation, and construction, and funding" *Public Law No: 109-234, Making emergency supplemental appropriations for the fiscal year ending September 30, 2006*, added to those amounts by \$1.9B for ASFF and \$3.0B for the ISFF (those new amounts being available until 30 Sep 2007).
5. *Funding the ISFF and ASFF from the base. Pub.L. 109-289 (Sep 29, 2006)*. The FY07 Defense Appropriations Act moved funding of the ISFF (\$1.7B) and ASFF (\$1.5B) into the base.

G. Details of Personnel.

1. *FAA § 627, 22 U.S.C. § 2387*. When the President determines it furthers the FAA's purposes, statute permits a federal agency head to detail officers or employees to foreign governments or foreign government agencies, where the detail does not entail an oath of allegiance to or compensation from the foreign countries. Details may be with or without reimbursement. *FAA § 630, 22 U.S.C. § 2390*.
2. *FAA § 628, 22 U.S.C. § 2388*. When the President determines it furthers the FAA's purposes, statute permits federal agency heads to detail, assign, or otherwise make their officers and employees available to serve with international organizations, or serve as members of the international staff of such organizations, or to render any technical, scientific, or professional advice or service to the organizations. May be with or without reimbursement. *FAA § 630, 22 U.S.C. § 2390*.

3. *22 U.S.C. § 1451.* Authorizes the Director, USIA, to assign U.S. employees to provide scientific, technical, or professional advice to other countries. Details may be on reimbursable or nonreimbursable basis. Does not authorize details related to the organization, training, operation, development, or combat equipment of a country's armed forces.
 4. *10 U.S.C. § 712.* Authorizes President to detail members of the armed forces to assist in military matters in any republic in North, Central, or South America; the Republics of Cuba, Haiti, or Santo Domingo; or -- during a war or a declared national emergency -- in any other country. Details may be on a reimbursable or non-reimbursable basis.
- H. *Excess Defense Articles (EDA).* Defense articles no longer needed by the U.S. may be made available on a grant basis.
1. *FAA § 516, 22 U.S.C. § 2321j.* Authorizes both lethal and non-lethal EDA (including Coast Guard equipment) support to any country for which receipt was justified in the annual Congressional Presentation Document (CPD). It continues to accord priority of delivery to NATO, non-NATO Southern-flank allies, and the Philippines, as well as continuing the 7:10 EDA grant split between Greece & Turkey. *See* Defense and Security Assistance Improvements Act, Pub. L. 104-164 (1996) (consolidation of EDA authorities into §516 and repeal of §§ 518- 520); Security Assistance Act of 1999, Pub. L. 106-113, § 1211(b) (1999).
 2. *Amount* - An aggregate ceiling of \$425M per year. Cost is determined using the depreciated value of the article.
 3. *Transportation:* No-cost space available transportation is authorized for countries receiving less than \$10M FMF or IMET in any FY if a determination is made that it is in the national interest of the United States to do so.
- I. Reimbursable Support. Check the details of these specific statutory authorities, many allow retention of the reimbursements for credit to the originally funding appropriation as an exception to the Miscellaneous Receipts Statute.

1. *FAA § 607, 22 U.S.C. § 2357* - Authorizes any federal agency to furnish commodities and services to friendly countries and international organizations on an advance-of-funds or reimbursable basis.
2. *FAA § 632, 22 U.S.C. 2392* - Authorizes the State Department to use its funds to obtain DoD's support under the FAA or Title 10 authorities.
3. *Economy Act, 31 U.S.C. § 1535* - Authorizes the provision of defense articles and services *indirectly* to third countries, the UN, and international organizations on a *reimbursable* basis for another federal agency (e.g., Department of State).
4. *Foreign Military Sales (FMS) - Arms Export Control Act (AECA) §§ 21-22, 22 U.S.C. 2761-62* - Third countries and the UN may enter standard FMS contracts with DoD for the sale of defense articles and services.
5. *Leases - AECA §§ 61-62, 22 U.S.C. § 2796-2796a* - Authorizes leases of Defense articles to foreign countries or international organizations, generally on a reimbursable basis.
6. *Acquisition & Cross-Servicing Agreements (ACSA) - 10 U.S.C. §§ 2341-2350 (DoD Directive 2010.9, 28 Apr 2003; Chairman of The Joint Chiefs of Staff, Instruction (CJCSI) 2120.01, 27 April 2004)* – ACSAs are bilateral agreements for the reimbursable mutual exchange of logistics support, supplies, and services (LSSS). DoD's authority to acquire logistic support without resort to commercial contracting procedures and to transfer support outside of the Arms Export Control Act (AECA). Under the statutes, after consulting with the State Department, DoD (i.e. the affected Combatant Commander) may enter into agreements with NATO countries, NATO subsidiary bodies, other eligible countries, the UN, and international regional organizations of which the U.S. is a member for the reciprocal provision of LSSS. Acquisitions and transfers are on a cash reimbursement or replacement-in-kind or exchange of equal value basis. Pricing is based on reciprocal pricing principles.
 - a. Two different ACSA authorities/methods exist:
 - (1) Cross-servicing agreements – 10 U.S.C. §2342 (full ACSA authority) as described above.

- (2) Acquisition Only Authority – 10 U.S.C. §2341. This is a limited authority allowing DoD to acquire LSSS for our deployed forces use from that host country if it has a defense alliance with the U.S., allows stationing of U.S. Forces, prepositioning of U.S. materiel, or allows U.S. military exercises or operations in the country. No specific formal agreement is required.
- b. LSSS definition 10 U.S.C. §2350 – The statute lists: food, billeting, transportation, POL, clothing, communication services, medical services, ammunition, base ops support (including incidental construction), storage services, use of facilities, training services, spare parts and components, repair and maintenance services, , calibration services, and port services. Prohibited items are those designated as significant military equipment on the U.S. Munitions List promulgated under the AECA.
 - (1) OIF/OEF special equipment transfer authority – In Section 1202 of the FY07 NDAA, *Pub.L. 109-364, (Oct 17, 2006)*, Congress granted specific authority to transfer personnel survivability equipment to coalition forces by ACSA.
 - (2) Ammunition definition expanded - The FY07 NDAA Conference Report (*Report 109-702*), provides an updated and expanded definition of ammunition which may be transferred by ACSA.

V. MILITARY COOPERATIVE AUTHORITIES - CONTACTS AND EXERCISES WITH FOREIGN MILITARIES.

A. Training Needs & Opportunities

1. In determining if we are training foreign forces primarily for their benefit, the law defines "training" very broadly: "[T]raining includes formal or informal instruction of foreign students in the United States or overseas by officers or employees of the United States, contract technicians, or contractors (including instruction at civilian institutions), or by correspondence courses, technical, educational, or information publications and media of all kinds, training aid, orientation, training exercise, and military advice to foreign military units and forces." AECA § 47(5) (22 U.S.C. § 2794(5)). The FAA § 644 (22 U.S.C. § 2403) contains a substantially similar definition, though "training exercises" is omitted.

2. The default setting for training with foreign forces is that could be interpreted as security assistance that must be completed by FMS or IMET or other DOS authority. Although that is changing somewhat in regard to new authorities like 1206 and 1208 discussed below, these specific authorities that require a program be forwarded for SecDef or POTUS approval and prior notification to Congress. But, if the primary purpose of the exercise / interaction with foreign forces is for interoperability or training US forces, then the expected collateral benefit of increased capability of foreign forces is permissible as a natural result of the US force training.

3. But, not all activity that appears to be training of foreign personnel is considered to be security assistance training. Providing foreign armed forces with interoperability, safety, and familiarization information is not security assistance training. "[M]inor amounts of interoperability and safety instruction [do] not constitute "training" as that term is used in the context of security assistance, and could therefore be financed with O&M appropriations." The Honorable Bill Alexander, House of Representatives, B-213137, Jan. 30, 1986 (unpublished GAO opinion). Additionally, if the primary purpose of the exercise or activity is to train U.S. troops, then the activity is not considered to be security assistance training of foreign forces. "In our view, a U.S. military training exercise does not constitute "security assistance: as long as (1) the benefit to the host government is incidental and minor and is not comparable to that ordinarily provided as security assistance and (2) the clear primary purpose of the exercise is to train U.S. troops." Gen. Fred F. Woerner, B-230214, Oct. 27, 1988.

B. Bilateral & Multilateral Exercise Programs.

1. *Developing Countries Combined Exercise Program (DCCEP)* - 10 U.S.C. § 2010.

- a. *Scope.* After consulting with SecState, SecDef may pay the incremental expenses of a developing country incurred by the country's participation in a bilateral or multilateral exercise, if --
 - (1) the exercise is undertaken primarily to enhance U.S. security interests; and
 - (2) SecDef determines the participation of the participating country is necessary to achieve the "fundamental objectives of the exercise and those objectives cannot be achieved unless the U.S. pays the incremental expenses"
- b. *Definition.* "Incremental expenses" are reasonable and proper cost of goods and services consumed by a developing country as a direct result of the country's participation in exercises, including rations, fuel, training, ammunition, and transportation. The term does *not* include pay, allowances, and other normal costs of the country's personnel.

2. Special Operations Forces (SOF) Training as Joint Combined Exchange Training (JCET) - 10 U.S.C. § 2011.

- a. *Scope.* The Commander of SOCOM and the commander of any other combatant command may pay any of the following expenses relating to the training of SOF of the combatant command --
 - (1) Expenses of training the SOF assigned to the command in conjunction with training with the armed forces and other security forces of a friendly foreign country.
 - (2) Expenses of deploying SOF for the training.
 - (3) The incremental expenses incurred by the friendly developing foreign country incurred as the result of the training.
- b. Definitions.

- (1) SOE. Includes civil affairs and psychological operations forces.
- (2) Incremental Expenses. The reasonable and proper cost of goods and services consumed by a developing country as a direct result of the country's participation in a bilateral or multilateral exercise, including rations, fuel, training ammunition, and transportation. The term does *not* include pay, allowances, and other normal costs of the country's personnel.

C. Section 1206

1. Section 1206 of the FY 06 NDAA, as amended by Section 1206 of the FY07 NDAA, provides a breakthrough in a new type of train and equip authority for DOD, but it also has serious limitations (most importantly that it has not yet been delegated below SecDef level approval):
 - (1) Authority to Build the Capacity of Foreign Military Forces
 - (2) SecDef approval required (with the concurrence of DOS)
 - (3) \$300M cap using O&M (Drawdown-like authority)
 - (4) Military forces (not security forces)
 - (5) Not available in nations where DOS assistance prohibited by other laws
 - (6) 15 day prior Congressional notification
 - (7) Three year pilot program only.

D. Section 1208

1. Section 1208 of the FY05 Appropriations Act provided another breakthrough new training authority, but it also has serious limitations.

- (1) Authority to provide support to foreign forces, irregular forces, groups, or individuals engaged in supporting or facilitating US special operations forces
- (2) SecDef approval required
- (3) \$25M cap
- (4) Reporting and Congressional notification requirements
- (5) Pilot program expires at the end of FY 07.

E. Bilateral & Multilateral Conferences, Seminars, & Meetings.

1. *The Need for Express Authority.*

- a. 31 U.S.C. § 1345: “Except as specifically provided by law, an appropriation may not be used for travel, transportation, and subsistence expenses for a meeting.”
- b. 62 Comp. Gen. 531 (1983): “[T]here is a statutory prohibition against paying the travel, transportation, and subsistence expenses of non-Government attendees at a meeting. . . . By using the word ‘specifically’ Congress indicated that authority to pay travel and lodging expenses of non-Government employees should not be inferred but rather that there should be a definite indication in the enactment that the payment of such expenses was contemplated.” *See also* B-251921 (April 14, 1993); 55 Comp. Gen. 750 (1976).

2. General Authorities.

- a. *U.S. Civilian Employees & Military Personnel.* See, e.g., 5 U.S.C. §§ 4109-4110; 31 U.S.C. § 1345(1); 37 U.S.C. § 412.
- b. *Individuals Performing Direct Services for the Government.* GAO, I Principals of Federal Appropriations Law 4-44 to 4-51 (3d ed. 2004); see also B-242880 (March 27, 1991); 8 Comp. Gen. 465 (1929); Joint Travel Regulations ¶ C.6000.3.

3. Specific Military Cooperative Authorities for Conferences or other Meetings

- a. *Latin American Cooperation (LATAM COOP) - 10 U.S.C. § 1050.* Authorizes the service secretaries to pay the travel, subsistence, and special compensation of officers and students of Latin American countries and other expenses the secretaries consider necessary for Latin American cooperation.
- b. *Bilateral or Regional Cooperation Programs - 10 U.S.C. § 1051.*

(1) *Scope.*

- (a) *Travel Expenses.* SecDef may pay travel, subsistence, and similar personal expenses of defense personnel of developing countries in connection with attendance at bilateral or regional conferences, seminars, or similar meetings if SecDef deems attendance in U.S. national security interest.
- (b) *Other Expenses.* SecDef may pay such other expenses in connection with the conference, seminar, or meeting as he considers in the national interest.

- (c) *Additional Funding Authority.* The authority to pay expenses under section 1051 is in addition to the authority under LATAM COOP, 10 U.S.C. § 1050. See DoD Authorization Act for FY 97, Pub. L. 104-201 §1065 (1996) (10 U.S.C. § 113 note) for Marshall Center Participants.
 - (d) *Asia-Pacific Center for Security Studies.* SecDef may waive reimbursement of the cost of conferences, seminars, courses of instruction, or similar educational activities of APC for foreign military officers and civilian officials if in US national security interest. See § 8081 of the DoD Appropriations Act for FY 2002, Pub. L. 107-117 (2001). See § 1306 of the FY 95 NDAA for similar authority to waive costs for participation of personnel from PfP and EAPC countries in activities of the George C. Marshall European Center for Security Studies.
- (2) *Limits.* Payments under section 1051 are limited to travel within the combatant commander's AOR in which the developing country is located or in connection with travel to Canada or Mexico, but when the combatant command headquarters is in the U.S., expenses may be paid for travel to the U.S.

F. Multinational Military Centers of Excellence.

- 1. Within Section 1205 FY07 NDAA, Congress provided specific authority, with specific limitations, to support NATO Centers of Excellence (COEs). The authority is a one-year pilot program authority given at DOD request.

G. Regional Cooperation Programs.

1. *Partnership for Peace (PFP) - DoD Authorization Act for FY 1995, Pub. L. No. 103-337, § 1307, 108 Stat. 2893 (1994) (See also H.R. Conf. Rep. No. 747, 103d Cong., 2d Sess. 63 (1994); S. Rep. No. 321, 103d Cong., 2d Sess. 42 (1994).)* \$30 million appropriated in FY 1995 to Joint Staff to “use existing authorities to the greatest extent possible” to provide assistance to and cooperate with PFP countries. \$40 million in FY 96 and again in FY97. \$44 million appropriated in FY 1998, but to OSD, not Joint Staff.

2. *Cooperative Threat Reduction (CTR) with States of Former Soviet Union (FSU) (“Nunn-Lugar”) - DoD Authorization Act for FY 2002, Pub. L. No. 107-107 §§ 1301-1309 (2001). (See also DoD Authorization Act for FY 1997, Pub. L. No. 104-201, 110 Stat. 2731(1996) (50 U.S.C. § 2362 note) (specifies activities that make up the CTR program). \$400 million of “no-year” money provided for FY 1994 and FY 1995 for various programs to dismantle FSU’s arsenal of weapons of mass destruction. \$300 million appropriated in FY 1996. \$327.9M appropriated in FY 97. \$440.4M for FY 1999, \$460.5M for FY 2000, \$443.4M for FY 2001, and \$403M for FY 2002; all “three-year” money. §§ 1303-1309 of the DoD Authorization Act for FY 2002 retains various limitations including reporting requirements and prohibitions against the use of the funds.*

H. Military-to-Military Contact Program - 10 U.S.C. § 168.

1. Authorizes SecDef to conduct military-to-military contacts and comparable activities that are designed to encourage democratic orientation of defense establishments and military forces of other countries.

2. A list of eight authorized activities allowed be funded is contained in 10 U.S.C. § 168 (c). These activities are to be funded by Traditional Command Authority (TCA) funds provided to the CoComs, the Chairman of the Joint Chiefs of Staff upon request or the Head of a DOD Component per subpara (b).

I. International Military Education & Training (IMET) –

1. FAA §§ 541-545 (22 U.S.C. §§ 2347-2347d). Security assistance program to provide training to foreign militaries, including the proper role of the military in civilian-led democratic governments and human rights.

2. See also Section 1222 of FY07 NDAA which deletes the IMET program from the sanctions of the American Servicemembers' Protection Act (ASPA).

VI. DOD HUMANITARIAN & DISASTER RELIEF OPERATIONS.

A. Immediate Response Authority

1. Immediate Foreign Disaster Relief: DoD Directive 5100.46 outlines various responsibilities for DoD components in undertaking foreign disaster relief operations in response to a Department of State request. However, paragraph 4.3 provides that the Directive does not prevent "a military commander at the immediate scene of a foreign disaster from undertaking prompt relief operations when time is of the essence and when humanitarian considerations make it advisable to do so." *See* DoD Directive 5100.46, Foreign Disaster Relief (Dec. 4, 1975).
2. Immediate Response Authority for Domestic Emergencies: DoD Directive 3025.1 outlines various responsibilities for DoD components in undertaking domestic disasters or emergencies in accordance with the Stafford Act, 42 USC §5121. Similar to the foreign disaster immediate response authority, "[i]mminently serious conditions resulting from any civil emergency or attack may require immediate action by military commanders, or by responsible officials of other DoD Agencies, to save lives, prevent human suffering, or mitigate great property damage. When such conditions exist and time does not permit prior approval from higher headquarters, local military commanders and responsible officials of other DoD Components are authorized by [DoD Directive 3025.1], ... to take necessary action to respond to requests of civil authorities. All such necessary action is referred to ... as 'Immediate Response.'" *See* DoD Directive 3025.1, Military Support to Civil Authorities (MSCA) (Jan. 15, 1993). *See also* AR 500-60, OPNAVINST 3440.16C, and MCO 3440.7A.
3. Emergency Medical Care: AR 40-400 authorizes the commander to provide medical care to any person in an emergency "to prevent undue suffering or loss of life." AR 40-400, Patient Administration, ¶3-55 (12 Mar 2001).

B. Need for Express Authority.

1. *The Honorable Bill Alexander, B-213137, 63 Comp. Gen. 422 (1984):*
 “[I]t is our conclusion that DoD’s use of O&M funds to finance civic/humanitarian activities during combined exercises in Honduras, in the absence of an interagency order or agreement under the Economy Act, was an improper use of funds, in violation of 31 U.S.C. § 1301(a).”
2. Generally, humanitarian assistance is “ordinarily carried out through health, education, and development programs under the Foreign Assistance Act of 1961, 22 U.S.C. § 2151 et seq.” *See The Honorable Bill Alexander, B-213137, 63 Comp. Gen. 422 (June 22, 1984).*

C. DoD Appropriations and other Policy Guidance for Humanitarian Assistance Activities.

1. Department of Defense Appropriations
 - a. OHDACA - \$63.2 in FY 2007 for Overseas Humanitarian, Disaster and Civic Aid (OHDACA) programs of the Department of Defense under §§401 [only for humanitarian demining], 402, 404, 2557, and 2561 of Title 10.
 - b. Budgeted or Fenced O&M for 10 USC §401 HCA. Funding for activities other than demining under §401 of Title 10 is provided through the general service O&M appropriations. *See*, section 8009 of the FY 05 Defense Appropriations Act, Pub. L. No. 108-287, (Aug. 4, 2004).
2. Policy and Program Guidance – Each fiscal year the Office of the Assistant Secretary of Defense for Special Operations and Low-Intensity Conflict (SO/LIC) and the Defense Security Cooperation Agency (DSCA) issue a joint message entitled: *Policy and Program Guidance for FY0? Overseas Humanitarian , Disaster, and Civic Aid (OHDACA) Activities and Humanitarian and Civic Assistance (HCA).*¹

¹ Message, R251658Z Feb 2004, Secretary of Defense, subject: Policy and Program Guidance for FY05 Overseas Humanitarian, Disaster, and Civic Aid (OHDACA) Activities and Humanitarian and Civic Assistance (HCA)[hereinafter FY 05 OHDACA and HCA Message].

- a. The FY05 guidance clearly set out separate HCA guidance that primarily reiterates the 10 U.S.C. § 401 requirements and distinguishes it from other humanitarian assistance activities. Additionally, the FY05 guidance provides a supplemental checklist (in addition to the general checklist) for HCA project submissions to the DOD. Generally, the supplemental checklist contains items necessary for compliance with 10 U.S.C. § 401 as follows:
- (1) Project is provided in conjunction with military operation/exercise
 - (2) Promotes specific operational readiness skills of U.S. military forces participating in project
 - (3) Labor will be performed by U.S. military forces
 - (4) Project falls into one of the [10 USC §401 HCA activities]
- b. The general checklist within the FY05 guidance provided points that have to be addressed for all OHDACA funded and O&M funded HCA projects. Selected general checklist requirements include whether the project supports the Global War on Terror (GWOT) objectives, contributes to DOD coalition building, strengthens the host nation's security and stability, enhances DOD's image and "ability to shape the regional security environment," and whether appropriate partnering with host nation militaries is accomplished to further goals of interoperability and coalition-building. In addition to the HCA supplemental checklist at paragraph 13, the FY05 guidance included supplemental checklists for humanitarian assistance (HA) under 10 U.S.C. § 2561, foreign disaster relief under 10 U.S.C. § 404, and humanitarian mine action under 10 U.S.C. § 401.

- c. The FY05 guidance provided strongly emphasized military participation requirements as follows: “Participation of U.S. military forces: All HA projects ... should maximize visible U.S. military participation to ensure that the projects are effective security cooperation tools. Active DOD participation improves the prospects for developing channels of influence and access, potentially provides operational readiness benefits, and generates unique training opportunities. DOD’s role must not be reduced to simply providing resources or writing checks.”

D. Humanitarian & Civic Assistance (HCA) - 10 U.S.C. § 401 See also DOD Dir. 2205.2, 6 Oct. 1994; DOD Instr. 2205.3, 27 Jan. 1995.

- 1. *Scope of Authority.* Secretary concerned may carry out HCA in conjunction with authorized military operations of the armed forces in a country if the Secretary determines the activities will promote -
 - a. the security interests of the U.S. and the country where the activities will be carried out; and
 - b. the specific operational readiness skills of the servicemembers who will participate in the activities.
- 2. *Limits.*
 - a. May not duplicate other forms of U.S. economic assistance.
 - b. May not be provided (directly or indirectly) to any individual, group, or organization engaged in military or paramilitary activities.
 - c. SecState must specifically approve assistance.
 - d. Must be paid out of funds budgeted for HCA as part of the service O&M appropriations.

- e. U.S. personnel may not engage in the physical detection, lifting, or destroying of landmines (except concurrent with U.S. military operation), or provide such assistance as part of a military operation not involving U.S. forces.
- f. Expenses funded as HCA shall include the costs of consumable materials, supplies, and services reasonably necessary to provide the HCA. They shall not include costs associated with the military operation (e.g. transportation, personnel expenses, POL) that likely would have been incurred whether or not the HCA was provided. DoD Directive 2205.2, "Humanitarian and Civic Assistance (HCA) Provided in Conjunction with Military Operations" 6 October 1994, para. D.9.

3. *Definition.* HCA under 10 USC §401 means --

- a. medical, dental, veterinary care in rural or underserved areas;
- b. construction of rudimentary surface transportation systems;
- c. well drilling and construction of rudimentary sanitation facilities;
- d. rudimentary construction and repair of public facilities; and
- e. detection and clearance of landmines, including education, training, and technical assistance.
- f. For FY07, the DOD sought express language in 10 USC 401 to authorize certain types of communications and information technology assistance. The Congress did not add language or provide such potentially far-reaching authority, but in the Joint Explanatory note to the Conference Report to the FY07 NDAA, noted: "The conferees acknowledge that restoring basic information and communications capacity is a fundamental element of humanitarian and civic assistance...Accordingly, the conferees note that *rudimentary* construction and repair of public facilities, under Section 401(e)(4) of title 10 United States Code, includes information and communications technology as necessary to provide basic information and communication services."

4. *De minimis* HCA. 10 U.S.C. § 401(c)(4) and DOD Dir. 2205.2, para. E1.1.1.
 - a. Provides authority for commanders to react to HCA “targets of opportunity” during the course of a military operation. Such activities must be modest in scope and involve only “minimal expenditures for incidental costs.”
 - b. All material and supply costs incurred in executing a *De minimis* HCA action are funded from the unit’s O&M account because the unit uses its resources currently on-hand.
 - c. Rule of Thumb: A few soldiers, a few dollars, for a few hours. Combatant commanders or theater commanders may have promulgated specific guidance regarding the level of effort/funding that falls under the definition of *De Minimis* HCA in their AORs.
 - d. *Examples:*
 - (1) A unit’s doctor’s examination of villagers for a few hours, with the administration of several shots and the issuance of some medicine, but not the deployment of a medical team for the purposes of providing mass inoculations to the local populace.
 - (2) The opening of an access road through the trees and underbrush for several hundred yards, but not the asphaltting of a roadway.
 - e. *Appropriations.* *De minimis* HCA is funded primarily from the unit’s O&M account and also uses available personnel resources and other equipment/supplies that are available.
5. *Exercise-Related Construction (ERC) distinguished.*
10 U.S.C. § 2805(a)(2).

- a. Construction that is necessary for the U.S. military forces use (e.g. base camp construction, a bridge to the base camp, or other construction necessary for operations) during a Joint Chiefs of Staff directed exercise are funded with military construction (MILCON) appropriations and not through 10 USC § 401 HCA funding or other humanitarian assistance appropriations. 10 USC § 2805 also forbids funding ERC under \$750,000 as O&M funded construction.
- b. “[F]unds from this account may only support construction activities necessary for the conduct of U.S. military exercises. *The account is not a foreign assistance program.*” S. Rep. 355, 102d Cong., 2d Sess. 10 (1992) (emphasis added).

6. *Funding Sources or Appropriations.* Specifically fenced or budgeted O&M for HCA. Demining, however, uses OHDACA. De minimis HCA is funded from the unit’s O&M account.

E. Humanitarian Assistance - 10 U.S.C. § 2561.

1. Scope.
 - a. *General.* To the extent provided in authorization acts, funds appropriated to DoD for humanitarian assistance shall be used for providing transportation of humanitarian relief and **other humanitarian purposes worldwide.**
 - b. *Availability of Funds.* To the extent provided in the appropriations acts, OHDACA funds usually remain available for two years.
2. *Reports.* Statute contains detailed annual reporting requirements.
3. *Appropriations.* Funded from the OHDACA appropriation.
4. *§2561/401 Distinguished.* If it fits 401 in each and every particular, it’s 401 HCA. If not (but humanitarian purpose) it’s 2561 HA.

F. A New Paradigm in Humanitarian Assistance – The Commander’s Emergency Response Program (CERP).²

1. Originally Funded with Seized Iraqi Assets³ - CJTF-7 FRAGO 89

- a. The Coalitional Provisional Authority (CPA) accounted for the seized Iraqi funds, administered and distributed the funds to U.S. Commanders in Iraq for reconstruction assistance to the Iraqi people. The CERP was also funded with Iraqi oil sales proceeds and donor nation contributions referred to as the Development Fund for Iraq or DFI.
- b. Reconstruction assistance is the “building, repair, reconstruction, and reestablishment of the social and material infrastructure in Iraq.” *See*, FRAGO 89. Approximately \$78.6M was provided for >11,000 Projects. Examples of reconstruction assistance noted in FRAGO 89 are: financial management improvements, restoration of the rule of law and governance initiatives, day laborers for civic cleaning projects, and purchase or repair of civic support vehicles.

2. Now funded with funds appropriated in Supplemental funding bills, and authority included in NDAA’s. Because of the turnover of governing functions to the interim Iraqi government and the disestablishment of the CPA in June 2004, coalition forces no longer have access to seized Iraqi assets nor the Development Fund for Iraq (DFI).

- a. See Section 1202 of FY 06 NDAA.
- b. See FY06 Emergency Supplemental and Sec. 9007 of the FY06 and 9006 of the FY07 Appropriations Act.

² *See*, Lieutenant Colonel Mark Martins, *No Small Change of Soldiering: The Commander’s Emergency Response Program (CERP) in Iraq and Afghanistan*, ARMY LAW., Feb. 2004 and Major Kevin Huyser et al, *Contract and Fiscal Law Developments of 2003 – The Year in Review*, ARMY LAW., Jan. 2004, at p. 195 and 204.

³ *See*, Memorandum, The President to the Secretary of Defense, subject: Certain State- or Regime-Owned Property in Iraq (30 Apr. 2003).

3. Purpose. “[enable] military commanders in Iraq [and Afghanistan] to respond to urgent humanitarian relief and reconstruction requirements within their areas of responsibility by carrying out programs that will immediately assist the Iraqi [and Afghan] people.” Congress also exempted the CERP from normal statutory fiscal and contracting controls by allowing the appropriated funds to “be used, notwithstanding any other provision of law.”
 - a. New DoD Guidance for CERP – *See* Memorandum, Tina W. Jonas, Under Secretary of Defense Comptroller, to Secretaries of the Military Departments, et al, subject: Commander’s Emergency Response Program (CERP) Guidance (27 July 2005). Provided as Attachment A and a ‘must-have’ document if you will be providing any advice on CERP.
 - (1) This guidance has been incorporated into the Financial Management Regulation DoD 7000.14-R.
 - (2) The new guidance primarily assigns administration responsibilities, defines proper CERP projects, and specifies accountability procedures. Specific CERP projects were not changed in any great detail from prior guidance established through FRAGOs.

G. Transportation of Humanitarian Relief Supplies for NGOs – 10 U.S.C. § 402.

1. *Scope of Authority.* SecDef may transport to any country, *without charge*, supplies furnished by NGOs intended for humanitarian assistance. Transport permitted only on a *space-available* basis. Supplies may be distributed by U.S. agencies, foreign governments, international organizations, or non-profit relief organizations.
2. *Preconditions.* Before transporting supplies, SecDef must determine --
 - a. the transportation of the supplies is consistent with U.S. foreign policy;
 - b. the supplies to be transported are suitable for humanitarian purposes and are in usable condition;

- c. a legitimate humanitarian need exists for the supplies by the people for whom the supplies are intended;
 - d. the supplies will, in fact, be used for humanitarian purposes; and
 - e. adequate arrangements have been made for the distribution of the supplies in the destination country.
3. *Limits.* Supplies transported may not be distributed (directly or indirectly) to any individual, group, or organization engaged in military or paramilitary activities.

H. Foreign Disaster Assistance - 10 U.S.C. § 404.

- 1. *Scope of Authority.*
 - a. *General.* President may direct SecDef to provide disaster assistance outside the U.S. to respond to manmade or natural disasters when necessary to prevent the loss of life. Amounts appropriated to DoD for Overseas Humanitarian, Disaster, and Civic Aid (OHDACA) are available for organizing general policies and programs for disaster relief programs.
 - b. *Delegation of Authority.* President delegated to SecDef authority to provide disaster relief with SecState's concurrence and in emergencies when insufficient time to seek SecState concurrence (provided SecDef seeks SecState concurrence as soon as practicable thereafter). Executive Order 12966, 60 Fed. Reg. 36949 (July 14, 1995).
- 2. *Types of Assistance.* Transportation, supplies, services, and equipment.
- 3. *Notice to Congress.* Within 48 hours of commencing relief activities, President must transmit a report to Congress.
- 4. *Appropriations.* Funded from the OHDACA appropriation.

I. Excess Nonlethal Supplies for Humanitarian Relief - 10 U.S.C. § 2557.

1. *Scope of Authority.* SecDef may make available for humanitarian relief purposes any DoD nonlethal excess supplies. Excess supplies furnished under statute transferred to DoS, which is responsible for the distribution of the supplies.
2. *Limits.* Statute does not constitute authority to conduct any activity that, if carried out as a DoD intelligence activity, would require notice to the intelligence committees under 50 U.S.C. §§ 413 et seq.
3. *Definition.* “Nonlethal excess supplies” means property that is excess under DoD regulations and is not a weapon, ammunition, or other equipment or material designed to inflict serious bodily harm or death.

VII. SPECIAL AUTHORITIES.

A. Combatant Commander Initiative Funds (CCIF)

1. 10 U.S.C. § 166a. *See* DoD Appropriations Act for FY 2005, Pub. L. 108-287 (2004) (\$25M for CCIF in FY 2005 in Defense-wide O&M); Chairman of the Joint Chiefs of Staff Instruction (CJCSI) 7401.01A, “Combatant Commander Initiatives Fund,” 15 Aug 2003.
2. *Scope.* CJCS may provide to Unified Commanders (including NORAD) sums appropriated for the following activities --

(1) Force training (2) Contingencies (3) Selected operations (4) Command and control (4) Joint exercises (including the participating expenses of foreign countries) (5) Humanitarian and Civil Assistance (6) Military education and training to military and related civilian personnel of foreign countries (including transportation, translation, and administrative expenses) (6) Personnel expenses of defense personnel for bilateral or regional cooperation programs (7) Force protection. Section 902 of the FY07 NDAA also added “*civic assistance, to include urgent and unanticipated humanitarian relief and reconstruction assistance*” as a proper purpose for the use of CCIF.

3. *Relationship to Other Funding.* Any amount provided as CCIF for an authorized activity are “in addition to amounts otherwise available for that activity during the fiscal year.”
4. *Limits.* 10 U.S.C. § 166a(e) Of funds made available --No more than \$10 million may be used to buy end items with a cost greater than \$15,000; No more than \$10 million may be used to pay the expenses of foreign countries participating in joint exercises; No more than \$5 million may be used for education and training to military and related civilian personnel of foreign countries; and No funds may be used for any activity for which Congress has denied authorization.

B. Emergency & Extraordinary (E&E) Expenses - 10 U.S.C. § 127.

1. *General.* Within appropriations made for this purpose, SecDef may pay for any emergency or extraordinary expenses that cannot be anticipated or classified. SecDef may spend the funds appropriated for such purposes as deemed proper; and such determination is final and conclusive upon the accounting officers of the U.S. This authority may be delegated (and redelegated).
2. *Congressional Notification.* DoD Authorization Act for FY 1996 revised § 127 to require that SecDef give congressional defense and appropriations committees 15 days advance notice before expending or obligating funds in excess of \$1 million and five days advance notice for expenditures or obligations between \$500,000 and \$1 million. Pub. L. No. 104-106, § 915, 110 Stat. 413 (1996).

C. Contingency Operations Funding Authority.

1. 10 U.S.C. § 127a (amended by DoD Authorization Act for FY 1996, Pub. L. No. 104-106, § 1003, 110 Stat. 415 (1996))

2. *Applicability.* Deployments (other than for training) and humanitarian assistance, disaster relief, or support to law enforcement operations (including immigration control) for which funds have not been provided, which are expected to exceed \$50 million, or the incremental costs of which, when added to other operations currently ongoing, are expected to result in a cumulative incremental cost in excess of \$100 million. Does *not* apply to operations with incremental costs not expected to exceed \$10 million.
3. *Consequences.* Congressional Notification & GAO Compliance Reviews. Statute contains provisions for both.
 - a. *Waiver of Working Capital Fund (WCF) Reimbursement.* Units participating in applicable operations receiving services from WCF activities may not be required to reimburse for the incremental costs incurred in providing such services. Statute restricts SecDef authority to reimburse WCF activities from O&M accounts. (In addition, if an activity director determines that absorbing these costs could cause an Anti-Deficiency Act violation, reimbursement is required.)
 - b. *Transfer Authority.* Authorizes SecDef to transfer up to \$200 million in any fiscal year to reimburse accounts used to fund operation for incremental expenses incurred.

D. Overseas Contingency Operations Transfer Account (aka ConOps Funds).

1. DoD Appropriations Act for FY 2005, Pub. L. No. 108-287 (2004). Appropriates \$10M of “no-year” funds “for expenses directly relating to Overseas Contingency Operations by United States military forces.” These funds may be transferred to O&M accounts, military personnel accounts, Defense Health Program appropriation, procurement accounts, RDT&E accounts, and working capital funds. See DOD Reg. 7000.14-R, DOD Financial Management Regulation, vol. 12, Special Accounts Funds and Programs, ch. 23, Contingency operations (Feb. 2001). See also Sec. 8114, FY05 DoD Appropriations Act for Congressional reporting requirements within 30 days after the end of the fiscal quarter that the transfer takes place.

E. Combating Terrorism Readiness Initiative Funds. 10 USC § 166b; CJCSI 5261.01B, July 1, 2001.

- a. Section 1512 of the FY 2002 National Defense Authorization Act amends Title 10 to add a new Section 166b. Section 166b codifies the longstanding practice of making funds available for high-priority unforeseen requirements related to combating terrorism. These funds are in addition to any other funds available for the same purpose.
- b. Funds may be used for the following activities:
 - (1) Procurement and Maintenance of physical security equipment;
 - (2) Improvement of physical security sites;
 - (3) Under extraordinary circumstances, funds may be used for physical security management planning, procurement and support of security forces and security technicians, security reviews and investigations and vulnerability assessments, and any other activity related to physical security.
- c. Priority should be given to emergency or emergent unforeseen high-priority requirements for combating terrorism.

VIII. SECTION 8050 NOTIFICATION. DOD APPROPRIATIONS ACT FOR FY 2007.

- A. And similar sections for previous FYs. General.
 - 1. Requires DoD to notify the congressional appropriations, defense, and international relations committees 15 days *before* transferring to another nation or international organization any defense articles or services (other than intelligence services) in conjunction with (a) peace operations under chapters VI or VII of the UN charter or (b) any other international peacekeeping, peace-enforcement, or humanitarian assistance operation.
 - 2. Notice Requirement. The notice required includes:

3. A description of the articles or services to be transferred;
4. The value of the equipment, supplies, or services; and
5. With respect to a proposed transfer of supplies and equipment, a statement of
 - a. whether the inventory requirements of all elements of the armed forces (including the Reserve Components) for the types of articles and supplies to be transferred have been met; and
 - b. whether the items to be provided will have to be replaced and how the President proposes to pay for such replacement.
6. Congress' Intent. Section 8117 of the DoD Appropriations Act for FY 1996 was originally part of the House DoD Appropriations Bill (H.R. 2126), which was adopted in the first Conference without comment. The House Appropriations Committee expressed concern about *the diversion of DoD resources to non-traditional operations*, such as Haiti, Guantanamo, Rwanda, and the former Yugoslavia. The Committee stated that Congress must be kept fully aware of the use and involvement of defense assets in "essentially non-defense activities in support of foreign policy." H.R. Rep. No. 208, 104th Cong., 1st Sess. 12 (1995).
7. President's Interpretation. In "acquiescing" in Appropriations Act, President expressed concern about section 8117 and pledged to interpret it consistent with constitutional authority to conduct foreign relations and as Commander in Chief. Statement by the President (Nov. 30, 1995). This practice repeats annually.
8. Scope.
9. *Included Activities.* Section 8050 affects DoD's use of any statutory authority to furnish articles and services to other countries and international organizations during peace, humanitarian, and disaster relief operations. Examples include --

- a. *Acquisition & cross-servicing agreements* during peace and humanitarian assistance operations (10 U.S.C. §§ 2341-2350).
 - b. *Drawdowns* for peace and humanitarian assistance operations (Foreign Assistance Act (FAA) §§ 506, 552).
 - c. *Humanitarian & Civic Assistance* (HCA) (10 U.S.C. §§ 166a(b)(6), 401).
 - d. *Humanitarian Assistance* to the extent the assistance is provided to another nation or an international organization (10 U.S.C. § 2561).
 - e. *Excess nonlethal supplies* for humanitarian relief (10 U.S.C. § 2557).
 - f. *Reimbursable support* to other nations and international organizations in connection with peace and humanitarian assistance operations (FAA § 607; UNPA § 7), and reimbursable support to other federal agencies for peace and humanitarian assistance operations to the extent that the transfer results in DoD transferring articles or services to another nation or international organization (31 U.S.C. § 1535; FAA § 632).
 - g. Landmine clearance activities (FY 1995 DoD Authorization Act, Pub. L. 103-337, §1413 (1994)).
10. *Excluded Activities.* Section 8050 does not affect all DoD activities with other countries and international organizations. Examples of excluded activities include --
- a. *Exercises* in which the DoD pays the incremental expenses of participating developing countries -- including Partnership for Peace (PFP) exercises (10 U.S.C. § 2010).
 - b. *SOF training* (10 U.S.C. § 2011).

- c. *Bilateral/regional conferences* and seminars unconnected with peace and humanitarian assistance operations (10 U.S.C. § 1051).
- d. *LATAM Coop* unconnected with peace and humanitarian assistance operations (10 U.S.C. § 1050).
- e. *Military-to-military contacts* (10 U.S.C. § 168).
- f. *EDA authorities* (FAA §§ 516), which already have congressional notice requirements equal to or in excess of 15 days.
- g. Support for other nations and international organizations in operations *unrelated* to peacekeeping, peace enforcement and humanitarian assistance (*e.g.*, coalition operations in time of war).

B. Compliance. DoD complies with section 8050 by --

- 1. Notifying Congress before DoD transfers supplies or services in connection with peace or humanitarian assistance operations; or
- 2. Transferring supplies and services in such operations without congressional notification when --
 - a. Providing disaster relief;
 - b. Providing support *without* using funds appropriated to DoD (*e.g.*, “advance-of-funds” basis); or
 - c. Providing support under an FMS case.

IX. CONCLUSION.

ENCLOSURE A – CERP GUIDANCE



COMPTROLER

UNDER SECRETARY OF DEFENSE
1100 DEFENSE PENTAGON
WASHINGTON, DC 20301-1100


JUL 27 2005

MEMORANDUM FOR SECRETARIES OF THE MILITARY DEPARTMENTS
UNDER SECRETARY OF DEFENSE (POLICY)
COMMANDER, UNITED STATES CENTRAL COMMAND
GENERAL COUNSEL OF THE DEPARTMENT OF
DEFENSE
SPECIAL INSPECTOR GENERAL FOR IRAQ
RECONSTRUCTION

SUBJECT: Commanders' Emergency Response Program (CERP) Guidance

Attached is revised financial management guidance and internal control and reporting requirements for the CERP.

Responsible Department of Defense officials should ensure that this guidance is applied consistently in administering the CERP in order to maintain the transparency and accountability of the program. Questions regarding the application of the guidance may be directed to my point of contact, Ms. Audrey Clark. She may be reached by telephone at (703) 695-9437 or by email at audrey.clark@osd.mil.



Tina W. Jonas

Attachment;
As stated

cc:
Chairman, Joint Chief of Staff
Defense Finance and Accounting Service



Adobe Acrobat 7.0
Document

ENCLOSURE B – LOGCAP - DOD GC OPINION



Adobe Acrobat 7.0
Document